Supreme Court, U.S.
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No. 01-485

IN THE

Supreme Court of the United States

FARMERS INSURANCE EXCHANGE,
Petitioner,

v.

ROSE M. BELL, LOREN D. MITCHELL, RACHEL POESCHEL, WYNN ANDERSON AND JOSEPH C. KOKAISL, individually and on behalf of others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the claims representatives employed by petitioner insurance company's Personal Lines division were "administrative" employees within the meaning of the former, superceded version of California Industrial Welfare Commission Wage Order 4, and therefore not entitled under California law (California Labor Code §1194) to premium pay for the overtime work they performed.

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OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. A1-A46) is reported at 105 Cal.Rptr. 59. The order of the Court of Appeal denying rehearing (Pet. App. 47) and the order of the California Supreme Court denying review (Pet. App. 48) are unreported. The pertinent summary adjudication order of the Alameda County Superior Court (Pet. App. 49-55) is unreported.

JURISDICTION

The California Supreme Court denied review on June 20, 2001. The petition for certiorari was filed on September 20, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). The Court lacks jurisdiction, however, because of the absence of a substantial federal question.

STATUTES AND OTHER MATERIALS

This case involves the superceded version of Wage Order 4 of the California Industrial Welfare Commission that was in effect prior to October 1, 2000, not the current version of Wage Order 4 set out in the Appendix to the Petition for Certiorari. The pertinent parts of the applicable wage order are set out in an Appendix to this Brief in Opposition (Res. App. 1a-16a).

STATEMENT

1. Overview.

Pursuant to California Labor Code §1194, the California Industrial Welfare Commission ("IWC") has adopted a series of wage orders requiring employers in California to pay their workers a premium rate for daily and weekly overtime work. Respondents are a class of about 2,400 Personal Lines claims representatives employed by petitioner Farmers Insurance Exchange ("FIE") in California. In October 1996, respondents brought suit against FIE in the Alameda County Superior Court for nonpayment of overtime compensation required by the applicable state wage order—the now-superceded version of Wage Order 4 in effect prior to October 1, 2000. Pet. 3; Pet. App. 16-17.

Wage Order 4 contained an exemption from state law overtime protections for "persons employed in administrative, executive, or professional capacities." Pet. App. 4. FIE asserted as its Fourth Affirmative Defense that its Personal Lines claims representatives were "administrative" employees within the meaning of this Wage Order and therefore not entitled to the protections of California overtime law. After the parties filed cross-motions concerning the validity of FIE's defense, the trial court granted summary adjudication to respondent claims representatives, holding that they were not exempt under California law and that FIE was therefore

required to pay them statutory overtime premiums under Labor Code §1194. The California Court of Appeal affirmed this summary adjudication ruling in the course of deciding FIE's later interlocutory appeal from an order awarding interim attorney's fees to respondents' counsel. FIE's Petition for Certiorari seeks this Court's review of the limited portion of the California Court of Appeal's interlocutory interim fee decision that addresses the administrative employee exemption to state overtime law.

2. Facts.

FIE is an insurance company whose principal corporate function is insurance claims handling. FIE "contracts out" to an affiliated company, Farmers Group, Inc., all non-claims matters (such as sales and marketing, product development/pricing, financial oversight and investment management, human resources and payroll, and underwriting). In addition to processing claims arising from its own insurance policies, FIE also processes claims for affiliated insurance companies, which compensate FIE for this service. Bell I RT 30:22-31:7, 32:8-33:13; Bell I RA at 2598-2602, 2606-12, 2614-29, 2632-33, 2639-42, 2723-27.[1]

FIE's "Personal Lines" division processes indemnification claims arising under FIE's automobile and homeowners insurance policies sold to private individuals. Such claims include automobile damage and theft, residential building damage and contents damage or loss, and third-party automobile injuries. The homeowners' building and damage

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[1] Citations to the Appellant's Appendix (AA), Respondents' Appendix (RA), and Reporters Transcript (RT) in *Bell I* are to the record in FIE's prior interlocutory appeal to the California Court of Appeal in this case—*Bell v. Farmers Insurance Exchange*, No. A090005. FIE incorporated that record by reference into the record for the subsequent interlocutory appeal (No. A091134) on which FIE's Petition for Certiorari is predicated.

claims each average about $3,000; automobile damage claims average about $2,100; and bodily injury claims (other than the roughly 1% that are underinsured motorist claims) average $6,900. Bell I RA at 2363, 2374, 2384, 2764, 2798, 2808, 2852-52.

Respondent claims representatives, who comprise about one-third of FIE's total workforce, estimate and process Personal Lines claims. Their responsibilities, discretion, and autonomy are sharply limited by FIE. FIE's Personal Lines claims representatives do not have their own personal offices, or even cubicles, but are grouped together in large rooms at assigned desks in the Branch Claims Offices. When drafting correspondence, they are required to use standard form letters. Likewise, they must use a standardized, scripted voicemail greeting. FIE requires its claims representatives to make initial contact with claimants on the day a claim is filed, and FIE monitors their voice mailboxes to confirm that they return calls expeditiously. Bell I RA at 2392, 2563, 2717, 2819-20, 2899, 2919, 4441, 4445, 4541-42.

FIE's starting salaries for its claims representatives were recently as low as $26,000. Bell I RA at 2373-4, 2383-4. Turnover rates for claims representatives have been high; approximately 2,400 individuals have held approximately 830 Personal Lines claims representative positions since October 1, 1993. Bell I RT 61:14-17. When work levels increase beyond the capacity of the workforce to handle, the Branch Claims Offices hire "temps" to fill those Personal Lines claims representative positions. Bell I RA at 2374, 2385.

FIE's claims operation is overseen by a steep hierarchy, of which respondent claims representatives lie at the bottom rung. Top management is stationed at FIE's Home Office in Los Angeles, California, to which its three California Regional Offices report. The Personal Lines claims representatives, who are spread among FIE's approximately 70

Branch Claims Offices, report to Branch Claims Supervisors, who in turn report to Branch Claims Managers, who in turn report to one of FIE's Regional Offices, where several layers of claims overseers are employed. *See* record citations *infra*, at 6 n. 2.

FIE imposes strict control over its Personal Lines claims representatives' claims-handling functions, as shown by the detailed level of instruction and lack of discretion in the FIE "Claims Representative Field Manual." Bell I RA at 2416-18, 2442, 2454-57, 2460-62, 2717, 2898-2969. The Forward to FIE's Manual makes clear that FIE's claims representatives are not allowed to handle any matters of "importance":

> We have made the deliberate decision to vest the responsibility for our operations upon the Branch and Regional Claims Managers, and it is necessary that these officials accept this in its full sense. Again, *the actual handling of the routine and unimportant may be delegated, but questions of importance must be decided by the Branch Claims Manager, and at a higher level by the Regional Claims Manager.* [Bell I RA at 4049 (emphasis supplied)].

For example, instead of giving its Personal Lines claims representatives discretion in settling claims, FIE requires them to use standard estimating software to determine automobile and residential repair costs and market values for stolen and "total loss" damaged automobiles. With respect to homeowners' claims for contents damage or theft, FIE has a strict policy of paying the lowest price for a comparable item; and requires its claims representatives to inventory all claims for items whose value is $50 or more, using discount catalogs and calling local stores to determine the lowest comparable price. Estimating precision is expected on *all* files, and claims representatives are not permitted to close a file in excess of the "correct" indemnity value. Likewise, each

third-party bodily injury claim is considered to have a correct settlement range, based primarily on documented medical costs and lost work time. Bell I RA at 2375, 2386, 2421-22, 2435-38, 2444-47, 2583-84, 2666-76, 2705-08, 2790-94, 2814, 2837-42, 2923-25, 2953-54.

FIE requires any claim file valued in excess of a claims representative's monetary "file authority" to be reviewed by an FIE employee at one or more higher level, and all complex or unusual files must be submitted to overseers in the Regional Office and/or Home Office.[2] In addition, "reserved" files (property files open more than 30 days and all bodily injury claims open for 10 days) are reviewed by supervisors at regular intervals. *All* bodily injury claim settlements must be approved by a supervisor before the file can be closed. Supervisors also conduct "case reviews" of *all* open files, regardless of their value, on a monthly or more frequent basis. Moreover, FIE's claims overseers conduct FIE's "Quality Assurance Program," periodically auditing closed claim files for procedural compliance and claim "overpayments." Bell I RA at 2375-78, 2385-88, 2364-67, 2425-33, 2809-10, 2903, 2907, 2923, 3407-13, 3420, 3933-34. While coverage disputes are rare, they consume little time when they occur, and the role of the claims representatives with respect to those disputes is limited to fact-gathering. All decisions whether to provide or deny coverage are made at the Branch Claims Manager level or higher. Bell I AA at 1137, 1140, 1142; Bell I RA at 2368, 2378-79, 2389, 2688-89, 2693, 2718-20, 2779-81, 2904, 2932, 3369-70, 3637.

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[2] Bell I RA at 2433-34, 2444, 2561, 2571, 2710-13, 2777-78, 2782, 2799-2800, 2831-33, 2847, 2852-53, 4047-55, 4062-76, 4105, 4200-03, 4232, 4235, 4237, 4244, 4299-4300. The class members' "file authority" ranges between $500 and $15,000; most claims representatives have less than $5,000 authority. Bell I RA at 2413, 2694-2701, 4464-72.

In short, other FIE officials, at a much higher level in the company than respondent claims representatives, "administer" FIE's business. Claims policies and procedures are set by top level management at FIE's Home Office. All other decisions regarding how FIE's claim-handling business should be run (aptly denoted "claims administration" by FIE) are likewise made by persons other than the low-level Personal Lines claims representatives (including purchasing, budgeting, monitoring the adequacy of claims-handling staffing levels, and management of claims office facilities and equipment). Bell I RA at 2454-57, 2576-77, 2657-58, 2785-86, 2813, 2831-33, 2847, 2854-57, 2860-62. As the Court of Appeal stated, "the bulk of [the claim representatives'] time is involved in 'investigating and estimating claims, communicating with policy holders and third party claimants about the indemnity value of the claim, filling out numerous forms, performing various other clerical work, such as photocopying and matching mail to files, and with respect to field claims representatives, driving.'" Pet.App. 32 (quoting from Plaintiffs' Statement of Undisputed Facts).

3. The Decision Below.

The trial court granted summary adjudication to respondent claims representatives on FIE's Fourth Affirmative Defense, which alleged that FIE's Personal Lines claims representatives were exempt under the "administrative" exemption to the overtime requirements of the version of IWC Wage Order 4 then in effect. The claims representatives then moved for an interim award of attorney's fees under California Labor Code §1194, having prevailed on this threshold liability issue. The trial court granted plaintiffs' fee motion, and FIE took an interlocutory appeal to the California Court of Appeal, arguing that: 1) the trial court had erred in granting summary adjudication to the claims representatives in the first place; and 2) even if summary adjudication had been properly

granted, the claims representatives were not entitled to interim fees under California law.

Although the Court of Appeal ultimately *reversed* the interim fee award on the ground that interim fees are not available under California Labor Code §1194 (Pet.App. 38-46), it *affirmed* the trial court's threshold ruling that FIE's Personal Lines claims representatives were not exempt "administrative" employees under state law. Based on its careful "analysis of the peculiar nature of FIE's business and the claims representatives' role in that business" (Pet.App. 37-38), the Court of Appeal concluded that respondents "perform[] the day-to-day activities" of FIE's claims processing business—its only business. *Id.* at 27-28, 32. They "have no formal advisory role in setting FIE's overall claims handling policy and procedures or in managing FIE's business infrastructure . . . ." *Id.* at 29. Instead, "the claims representatives in the personal lines division are ordinarily occupied in the routine of processing a large number of small claims, . . . [and their] authority to settle claims is set at a low level that reflects the small size of most claims." *Id.* at 35-36. "[T]he record as a whole [thus] confirms the accuracy of FIE's own description of the claim representatives' responsibilities as being restricted to 'the routine and unimportant.'" *Id.* at 36.

Like the trial court, the Court of Appeal concluded that the "administrative" exemption should be limited to employees who actually perform administrative work rather than "production" work, and that on the undisputed facts before it, respondent claims representatives fell "clearly outside the category of administrative workers." Pet.App.37. The Court of Appeal thus noted that claims handling was a product that FIE provides for its individual and corporate clients:

> We find it particularly significant that FIE performs a substantial amount of claims handling work for other related companies within the Farmers Insurance Group

> of Companies and is reimbursed for the costs of these services. [Pet.App. 29.]

And, it further noted that FIE's Personal Lines claims representatives' job was to conduct the day-to-day production task of processing those claims:

> Claims arising in California from these policies, as well as from similar policies issued by other affiliated companies, are normally processed by claims representatives working in some 70 branch claims offices in the state. Employees in these branch claims offices, including clerical and supervisory employees as well as claims representatives, constitute the majority of FIE's workforce in California.
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> * * *
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> The undisputed evidence establishes that claims adjusting is the sole mission of the 70 branch claims offices where the plaintiffs worked. The claims representatives are fully engaged in performing the day-to-day activities of that important component of the business. [Pet.App. 2, 32.]

Accordingly, because the undisputed facts established that FIE's claims representatives are engaged in production work, the Court of Appeal held that these claims representatives do not fall within the administrative exemption from the overtime requirements of Wage Order 4.

Although FIE was the prevailing party before the Court of Appeal (because it successfully obtained reversal of the interim fee award), FIE sought review in the California Supreme Court of the portion of the Court of Appeal's opinion that affirmed the summary adjudication order. The California Supreme Court denied review, and FIE has now filed a Petition for Certiorari to this Court. During the pendency of these interlocutory appellate proceedings, the case proceeded to trial in the Alameda County Superior

Court. In June 2001, the jury returned a verdict against FIE, which recently filed a Notice of Intention to Move for New Trial or, Alternatively, for Judgment Notwithstanding the Verdict.

REASONS FOR DENYING THE WRIT

FIE's Petition seeks review of two narrow questions, neither of which was decided by the California Court of Appeal, regarding the proper application of the Fair Labor Standards Act exemption for workers "employed in a bona fide . . . administrative . . . capacity." 29 U.S.C. §213(a)(1). It would be difficult to imagine a less suitable vehicle than this case for resolving those federal law FLSA questions, however, because the California Court of Appeal's interlocutory ruling rests entirely upon *state* overtime law, not the FLSA. To be sure, the Court of Appeal referred to certain federal precedents in its decision, but it explicitly did so only for "insights" that might be useful in construing state law, while emphasizing that state and federal overtime law are not identical. Moreover, the California Court of Appeal's opinion does not discuss, even as a matter of state law, either of the questions the petitioner asks this Court to decide—questions not fairly raised by the facts of this case. To the contrary, the decision below merely applies the general distinction between "administrative" and "production" employees to the facts of a particular case involving an employer with a "peculiar" business. Pet.App. 37. The Petition should be denied.

1. FIE's Petition does not present a substantial federal question. Respondents brought their overtime claims under state law only. Pet.App. 2. Although FIE contends that a federal question is presented because "federal regulations are incorporated into Wage Order 4" (Pet. at 7), that is not how the Court of Appeal analyzed this case, and the version of Wage Order 4 quoted in the Petition is not the version of

Wage Order 4 applicable to this case. As FIE itself acknowledged below, "Wage Order 4 was revised comprehensively" during the pendency of its state court appeal. Pet.App. 16-17. The former version of Wage Order 4 does not contain the express reference to federal regulations upon which FIE now relies. *Compare* Petition at 6-7 & Pet.App. 84 *with* Res. App.[3] Moreover, although California law includes an exemption for "administrative" employees, that state law administrative exemption is *not* identical to the federal law administrative exemption, as the California Supreme Court has held in another case (*Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 797 (1999) (distinguishing between the federal law "primary duty" test and the state law 50% of the workday test)), and as the California Court of Appeal reaffirmed in this case.

FIE is correct that the Court of Appeal's decision includes a discussion of federal regulations and cases construing the FLSA. However, in addressing those authorities, the Court of Appeal explicitly stated that it was examining federal precedents only for the "insights" they might provide about the meaning of "administrative capacities" (Pet.App. 22), not because state and federal overtime law are identical or because state law incorporates federal law on this issue.

Even where a state court decision cites federal precedents, no federal issue is raised where, as here, the state court states that it is referring to federal authority for advisory purposes only, rather than because those authorities are controlling. To

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[3] Indeed, FIE's principal argument to the California Court of Appeal was that the trial court had erred in considering federal law principles at all, because the prior wage order that governed this case did *not* incorporate the distinction set forth in the federal FLSA regulations between non-exempt production employees and exempt administrative employees. *See* Appellant's Opening Court of Appeal Brief in No. A091134 at 10-27; Appellant's Reply Court of Appeal Brief in No. A091134 at 2-7.

avoid creating a federal law issue, the state court "need only make clear by a plain statement in its judgment or opinion that the federal cases are being looked to only for purposes of guidance, and do not themselves compel the result the court reached." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). That is precisely what the Court of Appeal did in this case.

The California Court of Appeal's decision explicitly states that it is looking to federal law only for "insights and a general methodology":

> We wish to make clear that *we do not perceive a degree of parallelism between federal and state law that would make the entire corpus of federal regulations construing the administrative exemption directly applicable* to the exemption provision of wage order No. 4. *We look to federal law only for insights and a general methodology* in construing the term "administrative capacities." [Pet.App. 22 (emphasis added).]

That statement, particularly when read in conjunction with the other language disavowing any intent to be bound by federal authorities, constitutes a "plain statement" that this case was decided under state law only and does not raise any federal question—substantial or otherwise. *See also* Pet.App. 16 (stating that the court is not "approving any theory of implied 'adoption' by reference to the federal regulations"); Pet.App. 17 (refusing to express any opinion as to the significance of the post-October 1, 2001 changes in the language of Wage Order 4); Pet.App. 35 (noting that the court's analysis must proceed "[i]n the absence of detailed interpretive regulations comparable to those in federal cases"). While FIE cites *Three Affiliated Tribes v. Wold Eng.*, 467 U.S. 138 (1984), this is neither a case in which the California courts "construe[d] state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements . . . [or] broadly in the belief that federal law poses no barrier to the exercise of state authority." *Id.* at 152.

2. The two questions presented for review by the Petition for Certiorari are neither discussed in the California Court of Appeal's opinion nor implicated by the facts of this case.

a. The Court of Appeal did not, as FIE claims, hold that courts deciding whether workers are "administrative" employees (as opposed to "production" employees) should consider only "the character of the internal department where employees work" rather than "the nature of an employer's business as whole." Petition at i. Rather, the California court determined, based on the undisputed facts of record, that claims adjusting was *one of the important components* of FIE's business, and that the Personal Lines claims representatives are best characterized as "production" workers because they provide this important claims adjusting service to customers.

The Court of Appeal began with the obviously correct premise that a business may provide more than one product or service:

> We find the analysis in *Reich v. Chicago Title Ins. Co.* (D.Kan. 1994) 853 F.Supp. 1325 to be especially instructive. The court examined the duties of the plaintiff escrow closers "to determine whether they carry out Chicago Title's day-to-day operations. . . or whether they administer the business affairs. . . [of the company]." Finding that escrow closers were engaged in day-to-day operations, the court stated, "Chicago Title is in the escrow closing business, and its . . . status as a title insurer does not alter the fact that escrow closings are a very real product. . ., which it markets and sells separate from . . . its overall title insurance operations." (*Id.* at p. 1330, fn. omitted.*)* [Pet.App. 27.]

The Court of Appeal then concluded that, however broadly FIE's business is defined, claims adjusting is one of the main products or services that petitioner supplies to its customers,

and is, moreover, the work that respondent Personal Lines claims representatives perform:

> We find it particularly significant that FIE performs a substantial amount of claims handling work for other related companies within the Farmers Insurance Group of Companies and is reimbursed for the costs of these services.
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> * * *
>
> The undisputed evidence establishes that claims adjusting is the sole mission of the 70 branch claims offices where the plaintiffs worked. The claims representatives are fully engaged in performing the day-to-day activities *of that important component* of the business. [Pet.App. 29, 32 (emphasis supplied).]

Because of "the peculiar nature of FIE's business" (Pet.App. 37), the classification of FIE's representatives as production workers was not even considered a close call by the California Court of Appeal. Their "role in the business organization places them *clearly* outside the category of administrative workers." *Id.* (emphasis supplied):

> First, it is undisputed that FIE does not carry out the sales activities ordinarily involved in operating an insurance business. . . . Secondly, as a reciprocal insurance exchange, FIE is managed by a related company . . . , known as the attorney-in-fact, which performs activities that would normally be included within the executive and administrative functions of a corporation. . . . The plaintiffs maintain that, in the absence of ordinary sales or managerial functions, "[t]he sole function of FIE's operation is handling claims arising under insurance policies." The statement is well documented by testimony of FIE managers and executives. For example, Thomas Norman stated unequivocally, "The Farmers Insurance Exchange does not do anything other than the claims function. . . ." [Pet.App. 28-29.]

Whether as a general principle a court should consider the business of a whole company or a single department in determining whether particular employees are production workers is therefore neither an issue raised by the facts of this case nor decided by the California Court of Appeal.

Likewise, although FIE claims to have identified two conflicting lines of federal authority on its separate department/whole company issue (Pet. at 11-12), none of the cases FIE cites contain any discussion of the issue at all. Those cases simply apply the administrative employee/production employee distinction to different factual contexts. For example, although FIE contends that *Webster v. Public School Employees of Washington, Inc.*, 237 F.3d 910 (9th Cir. 2001), creates an appellate conflict, there is no discussion in that case of any separate department/whole company distinction. Nor would such a discussion have affected the Ninth Circuit's analysis. The issue in *Webster* was simply whether plaintiff union field representative was engaged in administering the affairs of the bargaining unit the union represented (which the Ninth Circuit analogized to the union's "customers"), not whether the field representative was engaged in administering the affairs of the union itself.

b. The second question presented by the Petition for Certiorari is "whether courts should treat routine duties associated with exempt functions as being exempt functions in determining whether overtime must be paid." Petition at i. The California Court of Appeal's opinion, however, contains no generally-applicable holding about how to classify routine work "associated" with administrative work. The Court of Appeal had no need to reach this issue, because of its conclusion about the Personal Lines claims representatives' role in the company's business:

> In short, the record as a whole confirms the accuracy of FIE's own description of the claim representatives' responsibilities as being restricted to "the routine and

> unimportant." On matters of relatively greater importance, they are engaged only in conveying information to their supervisors—again primarily a "routine and unimportant" role. This characterization of their role in the company places the plaintiffs in the sphere of rank and file production workers. More precisely stated, the plaintiffs render a service within an important component of the FIE business organization, i.e., the branch claims offices, which this component of the organization exists to produce. Following federal precedents, we hold that this characterization of the plaintiffs' role in the business organization places them clearly outside the category of administrative workers. [Pet.App. 36-37.]

Before this Court could possibly reach FIE's argument that the California Court of Appeal erred in classifying "associated" routine work, it would first have to accept FIE's premise that the Court of Appeal erred in its understanding of the facts. According to FIE, the Court of Appeal failed to understand that because Personal Lines claims representatives make "recommendations," they must be regarded as "advising the management"—a function that FIE characterizes as constituting exempt "administrative" work. Pet. at 15. FIE then reasons that the routine day-to-day work that actually consumes the vast bulk of the claims representatives' time—which FIE itself describes as "legwork"—is necessarily "associated" with the so-called administrative work of advising management. Pet. at 15-16. From that last assertion, FIE derives its ultimate assertion that the Court of Appeal must have been wrong in concluding that its Personal Lines claims representatives were not exempt "administrators," because all time spent by those employees on routine tasks should have been deemed "associated" with the "exempt administrative" work of "advising management."

There are many flaws in this interlinked series of premises, beginning with the first premise about the significance of the Personal Lines claims representatives' "recommendations." That an employee sometimes makes "recommendations" does

not mean that the employee is necessarily engaged in "advising management" about important matters regarding the administration of the company, and therefore performing administrative work. Otherwise a file clerk's suggestion to her supervisor about which cabinet to store file folders in would be deemed an exempt "administrative" activity and, because the suggestion pertained to her routine filing work, all of that routine work would be treated as administrative work.

In this case, the Court of Appeal properly concluded that "recommendations" made by claims representatives are "associated in some manner with the claims adjusting function" of the Personal Lines claims representatives (Pet.App. 32), not with the management of FIE's business, and that the claims representatives' communications with management are more accurately described as "conveying information to . . . supervisors" about the adjustment of claims (Pet.App. 36) than as "advising the management" in any exempt administrative sense. The Court of Appeal further concluded that to the extent the claims representatives' "additional duties extend beyond the core tasks of claims adjusting, they involve intermittent and incidental tasks that involve a small part of the claims representatives' time (*e.g.* coverage issues, attendance at . . . settlement conferences)" and are therefore not "administrative" tasks at all. Pet.App. 32.

Given the fact-bound conclusions reached by the California Court of Appeal, this Court could not even reach FIE's second question—let alone decide that question in FIE's favor—without first delving into the specific details of the Personal Lines claims representatives' work duties, and then resolving the evidence differently than the California trial and appellate courts resolved it. Only if this Court reached a different factual conclusion concerning the nature of respondents' daily job functions would it be in a position

even to consider FIE's question regarding the proper classification of "associated" routine work. The California Court of Appeal itself never addressed the question that FIE raises because it was not presented on the facts as the Court of Appeal understood them. This Court should not address that question either.[4]

3. Finally, although the petition asserts that "millions of American workers" will be affected by the lower court's decision if review is not granted (Pet. at 5), the fact of the matter is that the decision at issue is by an intermediate state court of appeal ruling on interlocutory review from an interim fee order that applied a state wage order that has since been "revised comprehensively." Pet.App. 16. The state court's decision also involves only the "administrative" exemption to overtime requirements, not the "professional" exemption or the "executive" exemption, under which most overtime class action cases are litigated. And, as to the "administrative" exemption, the case below was not even close. FIE is in the business of processing insurance claims. Its Personal Lines claims representatives, comprising one-third of its workforce, process those claims under strict supervision and tight procedural controls, as comprehensively detailed in the state court record. The Court of Appeal concluded, based on the

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[4] The proper classification of "associated" routine work is also of little moment under *federal* law, because the FLSA test for the "administrative" exemption focuses on the employee's "primary duty," not how the employee spends the majority of his or her time. It is *California* law that imposes a strict, time-based test. *See Ramirez v. Yosemite Water Co.*, 20 Cal.4th at 797. FIE does not even purport to identify a dispute among lower federal courts on the classification of "associated" routine time; instead, it merely suggests that the state law test as applied by the Court of Appeal is inconsistent with a federal regulation. Pet. at 14 (quoting 29 C.F.R. § 541.202(a)). However, states are free to adopt overtime laws that are more protective of workers' rights than the FLSA, and the conflict that FIE claims to have identified is of no legal consequence, particularly in the factual context of this case.

undisputed facts presented on cross-motions for summary adjudication, that FIE's Personal Lines claims representatives' "role in the business organization places them *clearly* outside the category of administrative workers." Pet.App. 37 (emphasis supplied). This case does not warrant Supreme Court review.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

CALIFORNIA CODE OF REGULATIONS

Article 4. Professional, Technical, Clerical, Mechanical, and Similar Occupations

(Order No. 4-98, Effective 1-1-98)

§ 11040. Order Regulating Wages, Hours, and Working Conditions In Professional, Technical, Clerical, Mechanical, and Similar Occupations.

1. Applicability of Order. This Order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, unless such occupation is performed in an industry covered by an industry order of this Commission, except that:

(A) Provisions of sections 3 through 12 shall not apply to persons employed in administrative, executive, or professional capacities. No person shall be considered to be employed in an administrative, executive, or professional capacity unless one of the following conditions prevails:

(1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $150.00 per month: or

(2) The employee is licensed or certified by the State of California and is engaged in the practice of one of the following recognized professions: law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting, or is engaged in an occupation commonly recognized as a learned or artistic profession; provided, however, that registered nurses shall not be considered to be exempt

professional employees for the purposes of this subsection (2) of this order, unless they individually meet the administrative, executive, or professional criteria described in subsection (A)(l) above.

(B) The provisions of this Order shall not apply to employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or to outside salespersons.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

2. Definitions.

(A) "Commission" means the Industrial Welfare Commission of the State of California.

(B) "Division" means the Division of Labor Standards Enforcement of the State of California.

(C) "Professional, Technical, Clerical, Mechanical, and Similar Occupations" includes professional, semiprofessional, managerial, supervisorial, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to the following: accountants, agents, appraisers, artists; attendants; audio-visual technicians; bookkeepers, bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives: dispatchers; distributors; door-keepers; drafters; elevator operators; estimators; editors; graphic arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and technologists; models; nurses;

packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social workers; solicitors; statisticians; stenographers; teachers; telephone, radio-telephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations.

(D) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "'Employee" means any person employed by an employer.

(G) "Employer" means any person as defined in section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(H) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so. Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.

(I) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(J) "Outside Salesperson" means any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of

business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities.

(K) "Primarily" as used in section 1, Applicability, means more than one-half the employee's work time. Within the health care industry, the term "primarily" as used in section 1, Applicability, means (1) more than one half the employee's work time as a rule of thumb or, (2) if the employee does not spend over 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and/or administrative duties represent the employee's primary duty. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

(L) "split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(M) "Teaching" means, for the purpose of section 1 of this Order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(N) "Wages" (See California Labor Code, section 200)

(O) "Workday" means any consecutive 24 hours beginning at the same time each calendar day.

(P) "Workweek" means any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. Hours and Days of Work.

(A) No employee eighteen (18) years of age or over shall be employed more than forty (40) hours in any workweek unless the employee receives one and one-half (1 l/2) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. No overtime pay shall be required for hours of work in excess of any daily number.

(B) Provisions of subsection (A) above shall not apply to any employee whose earnings exceed one and one-half (1 1/2) times the minimum wage if more than half (1/2) of that employee's compensation represents commissions.

(C) One and one-half (1 1/2) times a minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek except that minors sixteen (16) and seventeen (17) years old who are not required by law to attend school and may therefore be employed for the same hours as an adult are subject to subsection (A) above.

(VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $500 to $10,000 as well as to criminal penalties provided herein. Refer to California Labor Code sections 1285 to 1311 and 1390 to 1398 for additional restrictions on the employment of minors.)

(D) if a meal period occurs on a shift beginning or ending at or between the hours of 10 p.m. and 6 a.m., facilities shall be available for securing hot food or drink or for heating food or drink; and a suitable sheltered place shall be provided in which to consume such food or drink.

(E) Except as provided in subsections (C), (D), and (G), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.

(F) The provisions of this section are not applicable to employees whose hours of service are regulated by

(1) the United States Department of Transportation Code of Federal Regulations, title 49, sections 395.1 to 395.13, Hours of Service of Drivers, or

(2) Title 13 of the California Code of Regulations, subchapter 6.5, section 1200 and following sections, regulating hours of drivers.

(G) No employee shall be terminated or otherwise disciplined for refusing to work more than 72 hours in any workweek, except in an emergency as defined in section 2(D).

(H) When an employee in the health care industry requests in writing, and the employer concurs, the employee shall be permitted to make up work time lost as result of personal obligations. The amount of make up time shall not exceed two (2) hours in any one workweek and must be made up during that workweek. With the exception of the make up time authorized in this subsection, the appropriate overtime provisions in section 3 shall apply to all other excess weekly hours worked in the workweek.

4. Minimum Wages.

(A) Every employer shall pay to each employee wages not less than four dollars and seventy-five cents ($4.75) per hour for all hours worked, effective October 1, 1996; not less than five dollars ($5.00) per hour for all hours worked, effective March 1, 1997; not less than five dollars and fifteen cents ($5.15) per hour for all hours worked, effective September 1, 1997; and not less than five dollars and seventy-five cents ($5.75) per hour for all hours worked, effective March 1, 1998, except:

(1) LEARNERS. Employees 18 years of age or over, during their first one hundred and sixty (160) hours of

employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(2) MINORS may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel, provided that the number of minors employed at said lesser rate shall not exceed twenty-five percent (25%) of the persons regularly employed in the establishment. An employer of less than ten (10) persons may employ three (3) minors at said lesser rate. The twenty-five percent (25%) limitation on the employment of minors shall not apply during school vacations.

Note: Under certain conditions, the full minimum wage may be required for minors. See Labor Code section 1391.2(b).

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. Reporting Time Pay.

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled

day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(D) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. Licenses for Handicapped Workers. A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(*See* California Labor Code, sections 1191 and 1191.5.)

7. Records.

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birthdate, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hour worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing

(1) all deductions;

(2) the inclusive dates of the period for which the employee is paid;

(3) the name of the employee or the employee's social security number; and

(4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. Cash Shortage and Breakage. No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.

9. Uniforms and Equipment.

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color.

Note: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

Note: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to section 400 and following of the Labor Code, or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. Meals and Lodging.

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

"Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(B) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement

between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

	Effective January 1, 1998	*Effective March 1, 1998*
Room occupied alone	$24.25 per week	$27.05 per week
Room shared	$20.00 per week	$22.30 per week
Apartment—two-thirds (2/3) of the ordinary rental value, and in no event more than	$290.80 per month	$324.70 per month
Where a couple are both employed by the employer, two-thirds (2/3) of the ordinary rental value, and in no event more than	$430.20 per month	$480.30 per month
Meals:		
Breakfast	$1.80	$2.05
Lunch	$2.55	$2.85
Dinner	$3.40	$3.80

(C) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.

(D) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. Meal Periods.

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work

period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of employer and employee. Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

(B) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

(C) Notwithstanding any other provision of this order, employees who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employe. at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

12. Rest Periods. Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.

However, a rest period need not be authorized for employees whose total daily work time is less than three and one half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

13. Change Rooms and Resting Facilities.

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean and sanitary.

Note: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. Seats.

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. Temperature.

(A) The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.

(B) If excessive heat or humidity is created by the work process, the employer shall take all feasible means to reduce

such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the employment requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth and such room shall be maintained at not less than 68°.

(C) A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and change rooms during hours of use.

(D) Federal and State energy guidelines shall prevail over any conflicting provision of this section.

16. Elevators. Adequate elevators, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. Exemptions. If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in section 7, Records; section 11, Meal Periods; section 12, Rest Periods; section 13, Change Rooms and Resting Facilities; section 14, Seats; section 15. Temperature; or section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

18. Filing Reports. (*See* California Labor Code, section 1174(a))

19. Inspection. (*See* California Labor Code, section 1174)

20. Penalties. (*See* California Labor Code, section 1199)

21. Separability. If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. Posting of Order. Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this Order and make it available to every employee upon request.

Note: Authority cited: Section 1173, Labor Code; and California Constitution, Article XIV, Section 1. Reference: Sections 1182 and 1184, Labor Code.